Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1295

McKEESPORT AREA SCHOOL DISTRICT,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,

Appellee.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,
Appellee.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

The McKeesport Area School District, appellant, appeals from a final judgment of the Commonwealth Court of Pennsylvania dated October 25, 1978 holding that the Pennsylvania Act 372 of 1972 does not violate the Establishment Clause of the First Amendment of the Constitution of the United States. The Supreme Court of Pennsylvania denied appellant's Petition for Allowance of Appeal on October 22, 1979 and appellant's application for Reconsideration of Denial of Allowance of Appeal on November 28, 1979.

QUESTION PRESENTED

Whether Pennsylvania Act 372 of 1972 (Act of December 29, 1972 P.L. 1726, No. 372, amending §1361 of the Public School Code of 1949 (24 P.S. §13-1361, as amended)) requiring school districts to transport resident nonpublic school pupils to and from schools located up to ten (10) miles beyond district boundaries violates the Establishment Clause of the First Amendment of the Constitution of the United States because of the Act's primary effect of advancing religion in addition to fostering excessive entanglement of the state with religion.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT, UNITED STATES CONSTITUTION:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ACT OF DECEMBER 29, 1972, P.L. 1726, No. 372, AMENDING §1361 OF THE PUBLIC SCHOOL CODE OF 1949.

SECTION 1:

The first paragraph of section 1361, act of March 10, 1949 (P.L. 30) known as the "Public School Code of 1949," amended January 14, 1970 (P.L. 468), is amended to read:

Section 1361. When provided.—The board of school directors in any school district may, out of the funds of

the district, provide for the free transportation of any resident pupil to and from the kindergarten elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten (10) miles by the nearest public highway, except that such ten mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. The board of school directors shall provide such transportation whenever so required by any of the provisions of this art or of any other act of Assembly.

RAISING THE FEDERAL QUESTION

The Pennsylvania Department of Education initiated this action by filing an Order to Show Cause on February 14, 1974, which was later amended on December 23, 1974. The McKeesport Area School District, in its Answer to the Amended Order to Show Cause, averred that "Act 372 on its face is invalid as it is in violation of the Establishment Clause of the First Amendment of the United States Constitution", and "Act 372 on its face is invalid as it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."

The hearing examiner appointed by the Secretary of Education acknowledged the constitutional challenge to Act 372 made by the appellant, McKeesport Area School District, but made no judgment as to the constitutionality or unconstitutionality of the Act. In a brief filed by the appellant with the Commonwealth Court of Pennsylvania and a Petition for Allowance of Appeal and an Application for Reconsideration of Denial of Allowance of Appeal filed with the Supreme Court of Pennsylvania the appellant specifically raised the Establishment and Equal Protection clause issues. The Commonwealth Court of Pennsylvania found that Act 372 did not violate these constitutional provisions and the Supreme Court of Pennsylvania decided, in its discretion, to deny appellant's appeal to that court.

STATEMENT OF THE CASE

On December 29, 1972, Pennsylvania Governor Milton J. Shapp approved Act. No. 372 o f1972 providing, *inter alia,* for transportation of pupils attending nonpublic schools.

Prior to the passage of Act 372 the appellant had been transporting nonpublic school students in accordance with the Act of June 15, 1965, P.L. 133, No. 91, amending Section 1361 of the Public School Code of 1949. During the 1974-1975 school year the McKeesport Area School District provided transportation within its boundaries to 265 nonpublic school students. The appellant provides and has provided free transportation for both public and nonpublic students within its geographical boundaries who live more than one and one (1½) miles from their elementary or secondary schools. The appellant has never had occasion to transport any of its regular students beyond its boundaries, except for exceptional children who are provided transportation outside the district as required.

From the date of passage of Act 372 until the 1979-1980 school year, the appellant provided free transportation for all eligible resident pupils attending public or nonpublic not-for-profit schools located within the District's boundaries. The appellant did not transport any eligible resident pupils to either public or nonpublic not-for-profit schools beyond District boundaries, except for exceptional students as required.

After being asked by the Department of Education to provide transportation services to nonpublic school children attending school beyond district boundaries, the Department issued its show cause letter to the

appellant school district on February 14, 1974, placing in issue the possible withholding of pupil transportation reimbursement for the 1973-1974 school year. In the Department's Amended Order to Show Cause dated December 23, 1974, the Department relied on the District's alleged refusal to transport students to five (5) specified institutions beyond District boundaries.

An adjudicatory hearing was held during March and April, 1975 before a Hearing Examiner appointed by the Secretary. Briefs were filed by all parties and the Hearing Examiner's report was filed on October 4, 1976. Exceptions to the report were filed by the appellant. On April 11, 1977, the Acting Secretary of Education filed his Final Order. An appeal was taken by the appellant to the Commonwealth Court of Pennsylvania, and, on October 25, 1978, the Commonwealth Court affirmed that portion of the Acting Secretary of Education's Final Order requiring the transportation of eligible school children beyond District boundaries, but vacated that portion of the Acting Secretary's Order pertaining to the withholding of the District's subsidy. Further appeal by the appellant School District was taken to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania, on October 22, 1979, denied appellant's Petition for Allowance of Appeal. The appellant filed an Application for Reconsideration of Denial of Allowance of Appeal with the Supreme Court of Pennsylvania, however, the Application was denied on November 28, 1979.

THE QUESTION IS SUBSTANTIAL

The statutory right of nonpublic, parochial school pupils to be transported to and from schools located beyond school district boundaries has not been previously addressed by this Court. A statutory requirement to provide such transportation where no similar transportation is provided to regular public school pupils raises a substantial Establishment Clause question.

In *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1 (1947), this Court upheld the constitutionality of a New Jersey program which offered nonpublic school pupils free transportation services along an established route. It was held in *Everson* the New Jersey statute approached the "verge" of being constitutionally prohibited by the Establishment Clause of the First Amendment, but upheld the program so as not to "inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens . . ." 330 U.S. at 16.

This Court has considered, post-*Everson,* two cases involving the issue of school transportation involving nonpublic students and has twice decided not to extend such transportation beyond the *Everson* parameters.

This Court, in *Luetkemeyer v. Kaufmann,* 419 U.S. 888 (1974), affirmed per curiam a decision by a three-judge District Court which upheld a Missouri statute providing bus transportation to public school children but denying it to nonpublic school children. The appellants had claimed that the statute violated the rights of Missouri's parochial school pupils to equal protection and to free exercise of religion.

Recently, this Court, in *Wolman v. Walter,* 433 U.S. 229 (1977) struck down an Ohio statute which, like Pennsylvania Act 372, provided that field trip transportation services had to be furnished to nonpublic school pupils if similar services were made available to public school pupils. The Court, for the first time in an Establishment Clause nonpublic school transportation case, applied the three-part test first articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and found that the Ohio statute in *Wolman* fostered excessive governmental entanglement with religion. According to the three-part test of *Lemon,* a statute must: 1.) have a secular purpose; 2.) have a "primary effect" that neither advances nor inhibits religion; and 3.) not foster excessive governmental entanglement with religion. Failure to satisfy all three of these elements will render the statute unconstitutional under the Establishment Clause.

Application of the three part test in both *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973) and *Sloan v. Lemon,* 413 U.S. 825 (1973) resulted in the invalidation of tuition grants to parents of pupils attending nonpublic schools. This Court applied the same test in *Meek v. Pittenger,* 421 U.S. 349 (1975) and struck down a Pennsylvania statute requiring the state to provide instructional material and auxiliary services to nonpublic school pupils.

A three judge federal court in Iowa and the District Court for the District of Rhode Island recently decided cases involving factual situations strikingly similar to the case at bar. In *Americans United for Separation of Church and State v. Benton,* 413 F. Supp. 995 (S.D. Iowa, 1975), the court concluded, after careful review of this Court's decisions involving state aid to nonpublic

schools, that provisions of the Iowa code which provided transportation services to nonpublic school pupils which were not provided to public school pupils had an unconstitutional primary effect of advancing religion.

The Iowa code in *Benton* made available two transportation options to nonpublic school pupils which were not available to their public school counterparts. In *Benton,* as in the case at bar, public school students were not being transported across district boundaries. The unequal treatment afforded to the two groups of students led the *Benton* court to find such a violation of the Establishment Clause of the First Amendment. After recognizing the continued vitality of the principles set forth in *Everson,* together with the constitutional paramenters established therein, the court held that:

> "In this case nonpublic school children are being afforded benefits that are not available to public school students. Thus, the state aid involved here is flowing to a special class composed primarily of sectarian elementary and secondary schools which are an integral part of the religious mission of the churches which support them. This differential treatment 'inescapably results in the direct and substantial advancement of religious activity' and thus is unconstitutional . . . " (citations and footnotes omitted.) 413 F. Supp, at 959-960.

In *Members of the Jamestown School Committee v. Schmidt,* the District Court for the District of Rhode Island reviewed Section 16-21-2 of the Rhode Island General Laws which appeared to provide equal transportation benefits to both public and nonpublic school students. The law provided that the school committee

of any town provide transportation for pupils residing within 15 miles of school and attending schools designated to serve residents of a specific area of the state, regardless of whether the school served was located within the town of residence. The District Court struck down the Rhode Island law holding that:

> "Section 16-21-2 is infirm because *in fact* it affords greater options—greater benefits—to children attending the quickly increasing number of regionalized religious schools than to children attending public schools. It has the effect *in fact* of transferring a major cost of regionalization from parents seeking to provide their children a religious education, and the religious bodies themselves, to the taxpayers of the state. This the legislature may not do." (citations omitted.) 427 F. Supp. at 1348. "It is no answer that Section 16-21-2, on its face, requires local school committees to bus children to any regional school, public or private, within a fifteen mile radius of the school district. Scrutiny of state laws under the Establishment Clause has never proceeded by blindly nodding approval to labels placed on aid schemes. Where, as here, the effect of those schemes is inescapably to aid sectarian schools, they will be struck down." (citations omitted.) 427 F. Supp. at 1348-1349.

Pennsylvania Act 372, like the statutes struck down in the *Benton* and *Schmidt* cases, has exceeded the *Everson* parameters and violated the Establishment Clause of the First Amendment. If the Act is permitted to stand, pupils attending nonpublic sectarian school in Pennsylvania will receive greater benefits in the form of free transportation services than public school pupils.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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1106 Lincoln Highway
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Phone: (412) 823-2336

Counsel for Appellant

Date: February 1980

APPENDIX A

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Sally Mrvos
Prothonotary

Irma T. Gardner
Deputy Prothonotary
801 City-County Building, Pittsburgh, Pa. 15219

November 29, 1979

Robert P. Costello, Esq.
1106 Lincoln Highway Suite B
North Versailles, Pa. 15137

Re: McKeesport Area School District, et al. *v. Department of Education, et al.*—No. 1774 Allocatur Docket

Dear Mr. Costello:

This is to advise you that the Court denied your Application for Reconsideration of Denial of Allowance of Appeal in the above-captioned matter on November 28, 1979.

Very truly yours,

SALLY MRVOS
Prothonotary

SM:ad
cc: Andrew G. Uncapher, Esq.
Philip J. Murren, Esq.
Patricia A. Donovan, Esq.
William Fearen, Esq.

Appendix B.

APPENDIX B

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Sally Mrvos
Prothonotary

Irma T. Gardner
Deputy Prothonotary
801 City-County Building, Pittsburgh, Pa. 15219

October 24, 1979

Robert P. Costello, Esq.
Gary J. Gushard, Esq.
1106 Lincoln Highway,
Suite B
North Versailles, Pa. 15137

Andrew G. Uncapher, Esq.
Uncapher and Uncapher
153 Grant Avenue
Vandergrift, Pa. 15690

Re: McKeesport Area School District and Kiski Area School District v. Dept. of Education v. Haduch, et ux., et al.
No. 1774 Allocatur Docket

Dear Messrs. Costello, Gushard, and Uncapher:

This is to advise you that the Court has entered the following Order on your Petition for Allowance of Appeal from the Order of the Commonwealth Court at No. 934 C.D. 1977 in the above-captioned matter:

"October 22, 1979
Petition denied.
Per Curiam"

Very truly yours,

SALLY MRVOS
Prothonotary

SM:ad
cc: Philip J. Murren, Esq.
Patricia A. Donovan, Esq.

Appendix C.

APPENDIX C

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

MCKEESPORT AREA SCHOOL DISTRICT AND KISKI AREA SCHOOL DISTRICT, Petitioners v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Respondent JOSEPH WILKS and HELEN WILKS, his wife et al., Intervenors	No. 934 C.D. 1977

Before:
HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE RICHARD DISALLE, Judge
HONORABLE JOHN A. MACPHAIL, Judge

Argued: September 12, 1978—Harrisburg

Appendix C.

Opinion

Opinion by Judge Rogers Filed: October 25, 1978

McKeesport Area School District and Kiski Area School District have filed a petition for review of the order of the Acting Secretary of Education requiring them to transport school children in accordance with the Secretary's interpretation of Section 1361 of the Public School Code of 1949. No issue of law or fact distinguishes this case from earlier cases decided by this Court and upholding the Secretary's interpretation of the Act and the Act's constitutionality as so interpreted. We will therefore enter an order essentially the same as the one made in those cases, which are: *School District of Pittsburgh v. Commonwealth Department of Education and Joseph Scott,* 33 Pa. Commonwealth Ct. 535, 382 A.2d 772 (1978); *Springfield School District v. Commonwealth Department of Education,* 35 Pa. Commonwealth Ct. 71, 384 A.2d 1049 (1978); *Pequea Valley School District v. Commonwealth Department of Education and Fabio Pini,* ..... Pa. Commonwealth Ct. ....., 387 A.2d 1022 (1978).

Order

AND NOW, this 25th day of October, 1978, paragraph 3 of the Secretary of Education's final order dated April 11, 1977 requiring the respondent districts to "transport all eligible non-public school children beyond the school district boundaries in accordance with the ten mile mandated requirement in Act 372" is affirmed; paragraph 4 thereof is vacated in its entirety, without prejudice to the Secretary's right to take future action with regard to subsidy as provided by law.

Theodore O. Rogers, J.

Appendix D.

APPENDIX D

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE ADMINISTRATIVE HEARINGS UNDER ACT 372 MCKEESPORT AND KISKI AREA SCHOOL DISTRICTS	FILE NO. 1974-5 1974-6

Report of Hearing Examiner to Secretary of Education

FINDINGS OF FACT

1. The Kiski Area School District (hereinafter referred to as "Kiski" and, collectively with the McKeesport Area School District, as the "School Districts") is a public school district located in Westmoreland and Armstrong Counties, Pennsylvania.

2. The McKeesport Area School District (hereinafter referred to as "McKeesport" and, collectively with the Kiski Area School District, as the "School Districts") is a public school district located in Allegheny and Westmoreland Counties, Pennsylvania.

3. The Department of Education of the Commonwealth of Pennsylvania (hereinafter referred to as the "Department") is the moving party here and is charged with the enforcement of the school code and related

statutes and regulations of the Commonwealth of Pennsylvania.

4. Joseph Wilks, Helen Wilks, James J. O'Hanlon, Helen L. O'Hanlon, Stanley T. Haduch and Constance A. Haduch (hereinafter referred to as "Intervenors"), being residents of the McKeesport Area School District or the Kiski Area School District and the parents of school-age children attending non-public not-for-profit schools, were granted leave to intervene as parties to this action.

5. The Pennsylvania School Boards Association (hereinafter referred to as the "Association"), while not granted leave to participate or intervene as parties to this action, were granted leave to attend and participate in the hearing sessions and to file and make written arguments and presentations throughout this matter.

6. Under various dates in 1973, the Department published and distributed to public and non-public school administrators guidelines and instructions as to the interpretation of Act 372 of 1972 (24 P.S. 13-1361) (hereinafter referred to as "Act 372").

7. Said guidelines were received by various administrative officers of the School Districts here.

8. The School Districts, during the school year 1973-1974, and subsequent school years, provided free transportation to eligible resident pupils attending public and some non-public, not-for-profit schools situated within the boundaries of the School Districts.

9. The School Districts did not provide any free transportation services for resident pupils to non-public, not-for-profit schools located beyond the boundaries of the two School Districts during the school years 1973-1974, and subsequent years.

10. Parents of non-public pupils who attended schools located outside the School Districts' boundaries but within ten miles of said boundaries requested transportation services from the School Districts at various times.

11. The requests of said parents and students were denied or ignored by the School Districts.

12. Following communications from the Department both requesting and directing the School Districts to comply with the mandates of Act 372, as interpreted by the Department, the School Districts did not supply free transportation to resident pupils attending non-public, not-for-profit schools located outside the School District boundaries but within ten miles of said boundaries.

13. Kiski is a school district of approximately one-hundred-thirty-eight square miles, measuring approximately 18.7 miles from north to south and approximately 14.8 miles west to east.

14. There are twenty-one non-public, not-for-profit schools located within the boundaries of Kiski and within ten miles of said boundaries.

15. As of early 1974, requests had been received from resident pupils for transportation to ten non-public, not-for-profit schools located within ten miles of the School District boundaries, the cost of which transportation has been estimated by Kiski to be $17,629.13 beyond the reimbursement which Kiski would receive from the Department of Education for such transportation.

16. The total cost of transportation for public and non-public school pupils within Kiski for the 1973-1974

school year was $343,153.65, which costs provided transportation for 5,207 pupils, in forty-six busses and two taxi cabs over a total of 646,380 miles.

17. The average cost for transportation within Kiski's boundaries for 1973-1974 was $65.90 per pupil.

18. The market value of the real estate of Kiski's tax base for the school year 1973-1974 was $100,234,600.00, and the assessed valuation of that real estate was $24,459,175.00.

19. Kiski's reimbursement factor with the Department of Education is .6915.

20. The McKeesport Area School District measures approximately 6.8 miles from west to east and approximately 8.5 miles from southeast to northwest.

21. There are seventy-seven non-public, not-for-profit schools located within the boundaries of McKeesport and within ten miles of said boundaries.

22. During the school year 1974-1975, McKeesport had 8,902 pupils enrolled, with a racial composition of eighty-five percent white and fifteen percent black.

23. During the school year 1974-1975, 3,640 students were transported to and from school by McKeesport.

24. Of the total number of pupils transported by McKeesport, 340 were transported to achieve racial balance in the schools, pursuant to a 1968 directive or citation to McKeesport by the Pennsylvania Human Relations Commission to prepare and implement plans to achieve racial balance in the schools.

25. The total transportation costs for McKeesport for the school year 1974-1975 was $372,460.00, for which it received a reimbursement from the Department of Education of $61,700.00.

26. McKeesport has not projected precise costs for transporting resident pupils to non-public, not-for-profit schools located within ten miles of its boundaries.

27. McKeesport's student population has shown a steady and gradual decline from 1967 through 1975, declining from a population of 10,675 pupils during the school year 1967-1968 to a population of 8,902 pupils during the school year 1974-1975.

28. The general population of McKeesport has declined from 63,000 people in 1930 to 53,000 in 1970.

29. The real estate tax base of McKeesport has been reduced by the acquisition of previously-taxed real estate by agencies of both the federal and state governments.

30. Several of the non-public, not-for-profit schools located within ten miles of the boundaries of the School Districts charge very substantial tuition and would be reasonably considered expensive alternatives to free public education.

Appendix D.

CONCLUSIONS OF LAW

I. Act 372 must be interpreted to create a duty upon school districts in Pennsylvania to transport resident pupils attending non-public, not-for-profit, schools located within the boundaries of that school district or within ten miles of the boudaries of that school district to and from said schools, if the school districts transport resident pupils to and from its public schools.

II. The Secretary of Education has the power and duty to withhold or forfeit reimbursement funds due to school districts by the Department of Education for failure to comply with the mandates of statutes of the Commonwealth of Pennsylvania and regulations of the Pennsylvania Department of Education.

III. The determination of the constitutionality of Act 372 is beyond the scope of this procedure and beyond the authority of this hearing examiner.

IV. The hearing examiner's refusal to compel the attendance and testimony of the Secretary of Education and a Deputy Attorney General was not a denial of due process under either the federal or state constitutions but was in accordance with accepted and valid administrative law.

V. The McKeesport Area School District and the Kiski Area School District have violated Act 372 and are subject to sanctions by the Secretary of Education for that violation.

Appendix D.

CONCLUSIONS AND RECOMMENDATIONS

Several days of hearings were held in this matter and the factual record and written arguments were submitted to this hearing examiner for his recommendation to the Secretary of Education. The School Districts have readily admitted that they did not provide to resident pupils the transportation services required by Act 372 as interpreted by the Department of Education. They have contended, instead, that Act 372 cannot be reasonably interpreted as urged by the Department of Education and does not require such transportation services beyond school district boundaries. For reasons set forth more fully in the Discussion section attached hereto, the contentions of the School Districts are rejected and the interpretation urged by the Department is accepted in this report and for purposes of making this hearing examiner's recommendation to the Secretary of Education.

In addition, the School Districts have urged that Act 372 is unconstitutional because it provides greater transportation services and benefits to students attending non-public schools than are given to resident pupils attending public schools and because, to the extent that it provides such uneven benefits, it violates the prohibitions contained in the First Amendment to the United States Constitution against church and state involvement. The argument set forth by the School Districts are beyond the scope and authority of this hearing procedure and this hearing examiner and are not considered in this report and recommendation.

Finally, the School Districts argued that their due process rights were denied by the refusal of this hearing examiner to call as a witness, and subpoena and

compel the testimony of, the Secretary of Education and a Deputy Attorney General who advised the Secretary of Education as to the Department's interpretation of Act 372. Again, for reasons set forth more fully in the Discussion section attached hereto, those arguments must fail.

This procedure has taken a great deal of time and has revealed considerable equities on both sides. The refusal by the School Districts to comply with the mandates of Act 372 and the directives of the Department of Education has cost many pupils the benefits conferred on them by that Act. That denial has cost those pupils' parents and schools unknown amounts of money to provide such transportations and has, much more importantly, denied those pupils the safety of free public transportation to and from schools. The refusal has also, it can be logically assumed, substantially impaired both the legislative scheme of Act 372 for statewide transportation and the efforts of the Department of Education to implement such a statutory scheme.

On the other hand, the School Districts have apparently operated in good faith throughout this matter. There is room for reasonable difference in the interpretation of the language of Act 372 and there is, as can be seen by a recent Federal District Court decision in Iowa, basis for questioning the constitutionality of the entire Act. Moreover, Act 372 places an extreme burden on these two school districts, very possibly more extreme than other school districts, because of the financial plight of those two particular school districts and the substantial distances over which transportation must be provided.

A literal and complete enforcement of Act 372's provisions to these two school districts will create a rather extreme factual situation. One school district is slightly over eighteen miles in width and, if a student residing on the eastern most extremity of that school district is to be provided with free transportation to a private school located 9.9 miles past the western boundary of the school district, it is conceivable that a child could be transported as much as twenty-eight miles, one way, to and from school each day. That would result in the child being transported substantially more than fifty miles per day to and from school. It is difficult to imagine the disastrous effect that such a transportation burden would place upon the school district's budget. Another unfortunate aspect of this particular application of Act 372 is that two school districts which are currently suffering such financial and fiscal difficulties must be compelled to transport students to and from private schools and academies which charge among the highest tuitions anywhere within this Commonwealth. It certainly seems a cool twist on the good intentions of Act 372 to think of the poorest voters residing in the most economically deprived area of one of the school districts spending some of their tax dollars transporting wealthy suburbanites' children to and from a private academy charging more tuition per year than some of those poor taxpayers may earn.

However, these are strained and perhaps even imagined distortions of the law. The general statutory scheme of Act 372 is to provide all students within this Commonwealth with free and safe transportation to and from the school of their choice. Any statewide statutory scheme can be expected to produce some unfortunate,

if not absurd, factual situations somewhere in this great Commonwealth. It is hoped that the factual situations argued by the school districts here will not ever be realized.

We must keep in mind that this is an administrative procedure. This hearing examiner and the Secretary of Education is not charged with reviewing or determining the wisdom of the legislative scheme, but merely with enforcing and executing it. The intelligence of legislative policy, or the lack thereof, is not properly part of this hearing procedure.

Moreover, the procedure of this hearing is now closed and it is time that the issues between the Department and the School Districts be resolved so that Act 372 can be fully implemented. Moreover, since the School Districts have denied the benefits of Act 372 to the designed recipients of such benefits, some action to restore that lost benefit would be reasonable.

For these reasons, it is the considered opinion and recommendation of this hearing examiner that any and all reimbursement transportation funds due and owing to the McKeesport Area School District and the Kiski Area School District for the school years 1973-1974, and all subsequent school years, be withheld from said School Districts because of their violation of and noncompliance with the requirements of Act 372. It is the further recommendation of this hearing examiner that, if the McKeesport Area School District or the Kiski Area School District makes adequate arrangements for the transportation of all pupils residing within their school districts and attending non-public and not-for-profit schools located within the boundaries of the said School Districts or within ten miles of said boundaries by the

nearest public highway for the upcoming school year and makes adequate arrangements for the reimbursement of all pupils entitled to transportation under Act 372 for the school terms 1973-1974 and all years subsequent, for out-of-pocket expenses actually incurred in providing transportation for such resident pupils to and from such schools during those school terms, which such arrangements are reasonably acceptable to all such pupils and their families, that the reimbursement transportation funds for the school term 1973-1974, and all subsequent school terms, not be withheld or forfeited but be paid promptly to the school districts, or school district.

DISCUSSION

The School District and the Department have raised and argued several issues relating to the interpretation and enforcement of Act 372. The most important of these issues have been raised, reviewed, and argued before in other actions during these hearing procedures to enforce Act 372.

I. Act 372 Must Be Interpreted to Create a Duty upon School Districts to Transport Pupils Attending Non Public Not-for-Profit Schools Located Within Their School District Residence or Within Ten Miles of the Geographical Boundary of Said School Districts.

The pertinent lauguage of Act 372 amends the first paragraph of Section 1361 of the Act of March 10, 1949, P.L. 30 (24 P.S. 13-1361) to read as follows:

> When Provided—The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any

resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided.

Neither Section 3161 nor its amendment by Act 372 requires a school district to provide free transportation to school pupils. However, when any school district provides free transportation to public school pupils, the Section directs that that school district also provide free transportation to resident pupils attending nonpublic schools. The Department, Kiski, and McKeesport all agree upon the interpretation of the Act that far. Beyond that interpretation, the Department argues that

the Section, as amended, requires free transportation for resident pupils attending non-public, not-for-profit schools located outside the school district boundaries, but within ten miles of those boundaries by the nearest public highway. Both Kiski and McKeesport contend that the above-quoted language only requires "identical" transportation for both public and non-public school pupils and, therefore, does not require transportation of non-public pupils beyond school district boundaries unless public school pupils are similarly transported. Both school districts admit that they provide free transportation to public school pupils and do not provide free transportation to resident pupils attending non-public, not-for-profit schools located outside the school district boundaries, even if such schools are within ten miles of the school district boundaries.

The dispute over the interpretation of the Act revolves around the language contained in the first sentence of the above-quoted paragraph compared to the language in the second sentence of that paragraph. The first sentence states that transportation will be provided to resident pupils to and from the school of their attendance "provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway . . . " The second sentence requires that, when provision is made for transportation of any pupils "to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend non-public kindergarten, elementary, and high schools not operated for profit to and from such

schools or to and from any points in the Commonwealth in order to provide field trips as herein provided."

The School Districts argued that the term "identical" contained in the second sentence modifies and defines the transportation required by the first sentence of that paragraph so that pupils attending non-public schools may not be given any transportation other than that given and provided to pupils attending public schools. Their argument is strained and must fall for several reasons.

First, the term "identical" would, it interpreted to provide the standard of all transportation for non-public school pupils, require all such pupils to be transported only to public schools. The term "identical" means exactly alike, equal, or the very same. If "identical" transportation were to be provided, the busses providing such transportation would have to be run along the same routes which they presently run or formerly ran to provide transportation merely to public school pupils. Any change in those bus routes would violate the standard of the term "identical." Of course, those routes lead only to public schools. Consequently, non-public school pupils would only be given partial transportation which would take them to the public school buildings. Such a result is absurd and is clearly not the intention of the drafters of Act 372. Section 3 of the Statutory Construction Act requires that statutes be interpreted to avoid such results.

> In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumptions, among others, may be used:

> (1) That the General Assembly does not intend a result that is absurb, impossible of execution or unreasonable. (1 Pa.S. 1922)

Such a statutory presumption would alone dispose of the argument made here by the School Districts.

Second, the very positioning of the term "identical" is a separate sentence from the language imposing the duty to transport non-public school pupils, indicates the intention of the legislature not to apply such a restrictive definition of their standards for transportation. The first sentence imposes the duty to transport pupils and the standard is that the pupils must be transported to the school of their attendance provided that school is located within certain geographical limits. The language of the first sentence clearly delineates those geographical limits. The standard thus imposed by the statute does not need further modification or explanation by any of the language contained in the second sentence, which only describes field trip transportation. When the design of a statute is so clear, the language needs no further complicated interpretation, but can stand on its own. Section 3 (b) of the Statutory Construction Act of 1970, provides as follows:

> When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. (1 Pa.S. 1921 (b))

Here, such a principal of statutory construction applies. The language of the first sentence of the above paragraph stands on its own and does not need any interpretation or modification by the language contained in any of the subsequent sentences of the Section.

Third, the School Districts argued that the term "identical" imposes a geographical limitation on the transportation to be provided under Act 372 to non-public school pupils. If we disregard the above arguments and accept that the single term "identical" contained in the second sentence of the Section does modify and define the transportation required by the Section, such a restriction as urged by the School Districts here does not follow.

The term "identical" can apply to any one or all of several aspects of the transportation to be provided. For instance, it can apply to the geographical distance of such transportation, as is here argued by the School Districts. It could also, for instance, apply to the vehicular type of transportation, the time or date aspects of such transportation, the routes to be traveled, or any one of several other aspects or factors of such transportation. In such an interpretation the single term "identical" can only be interpreted to restrict or define and modify the language in the first sentence which imposes the duty generally.

The difficulty with the School Districts' argument is that the particular standard of the geographical distance which pupils are to be transported is already provided by the first sentence of this section. The first sentence provides that pupils will be transported to their schools of attendance provided the school is located within ten miles of the geographical boundaries of the school district. To interpret the single term "identical" to further restrict the geographical standard already set forth makes all the language pertaining to the ten-mile limit superfluous and unnecessary. Moreover, it would give greater significance to a single term contained in a subsequent sentence that to the primary sentence which creates the duty to transport. The interpretation urged upon us here by the School Districts would create an irreconcilable conflct between the first and second sentence of the same paragraph. Obviously, such conflicts are to be avoided if they can in the course of reasonable interpretation of statutory language.

Finally, the interpretation urged upon us here by the School Districts defeats the very design of Act 372. The General Assembly did not intend to require "identical" transportation in the geographical sense for both public and non-public schools because such a requirement would make Act 372 unworkable and would deny any benefit of it to non-public school pupils. History has made such a standard in a free transportation statute unworkable. In the development of both public and private schools and school systems, the geographic areas served by the two systems have not generally coincided; public and not-public school drawing areas are not congruent. Whether created and operated by religious groups or by private education, private schools did not commonly draw from the same population base or geographical area as their public counterparts. The forces which created the political subdivisions which became the various school districts within the Commonwealth did not operate in the same way to create identical geographic drawing areas for non-public schools. As a result, any statutory scheme which is designed to provide transportation by public school districts to pupils attending non-public schools must not be limited to the geographic boundaries of the school districts. To restrict transportation to the geographical boundaries of a school district would give less-than-meaningful transportation to pupils attending such non-public schools. Such trans-

portation would give pupils attending non-public schools less-than-equal treatment under the Act and would, at least arguably, infringe upon their constitutional rights. But, more important to this discussion now, would defeat the very intention of the legislature to provide free, safe transportation to all pupils in the Commonwealth by restricting that transportation to make it worthless to most non-public school pupils.

For each and all of the above reasons, Act 372 leaves no doubt about its design and the requirement it imposes on school districts for transportation of all resident pupils, those attending public as well as non-public schools. The interpretation urged here by the School Districts is erroneous and must not prevent the enforcement of Act 372 in accordance with its clear mandate.

On the subject of the interpretation of Act 372, two other matters should be brought to the Secretary's attention. First, Kiski argues that Section 23.22 (b) of the Department of Education's own regulations (22 Pa. Code 23.33 (b)) prohibits transportation of resident school pupils beyond school district boundaries and, since that regulation is inconsistent with the interpretation argued by the Department, the Department is barred from requiring transportation beyond school district boundaries.

The answer to that argument is very simple. Regardless of the state of the Department's own regulations before the amendment of Section 3161 by Act 372, the clear requirements of Act 372 must control. The administrative regulations of any department must not stand in the way of enforcement of statutes enacted by the legislative branch and signed into law by the Governor. To prevent an administrative agency from enforcing a

valid statute because it is in conflict with a prior regulation of that agency would defeat representative government and would create in its place government by agency.

The School Districts appear to argue that although an administrative regulation may not prevent the enforcement of a legitimate legislative statute, it may restrict the interpretation of that statute by the agency which is bound by the regulation. Regardless of whether the restriction is imposed upon the enforcement of the statute or the interpretation of the statute, no administrative regulations can be allowed to override or supercede a legislative statute. Here, Act 372 must supercede all prior and inconsistent legislative regulations if it is to be given any effect whatsoever.

The second matter which should be considered by the Secretary is the possible effect upon the above interpretation of Act 372 by the recent case of *Americans United for Separation of Church and State* vs *Benton, et al.,* Civil No. 75-213-2, which was recently rendered by the United States District Court for the Southern District of Iowa. In that case, a statutory scheme somewhat similar to Act 372 was ruled unconstitutional by a three-judge panel of the United States District Court because it was found to violate the constitutional prohibition against church-state relations and specifically the prohibition against the establishment of any religion by governmental action. The District Court found that, to the extent a school district was required by the statute to provide transportation to non-public school pupils a greater distance than the transportation provided to public school pupils, the Act established a religion by giving direct transportation aid to non-public schools. Should that case and the interpretation of the constitu-

tion for which it stands be upheld and followed, the above interpretation of Act 372 may be brought into question. Under those circumstances, the interpretation of Act 372 here urged by the School Districts may be one way in which Act 372 could be upheld as constitutional. The School Districts cite the *Benton* case and argue it as grounds to avoid Act 372's mandates. It can be expected they will argue that their interpretation of Act 372 and its geographical limitations is the only way the Act can be saved after *Benton*. This hearing examiner, for the above reasons, is of the opinion that Act 372 is not susceptible to the interpretation urged by the School Districts but clearly requires transportation beyond the geographical boundaries of school districts. It is the opinion of this hearing examiner that the statute cannot be administratively "re-written" in accordance with the argument of the School Districts to avoid that *Benton* issue. However, the argument is certain to be made to the Secretary and he should be aware of it.

II. THIS HEARING PROCEDURE CANNOT RESOLVE THE CONSTITUTIONAL ISSUE OF SEPARATION OF CHURCH AND STATE

Both the School Districts raised the issue of the constitutional prohibition against the establishment of a religion by state action, contained in both the federal and state constitutions, as grounds for the School Districts' non-compliance with Act 372. They argue that the transportation required by the Act is such as exceeds the requirements of safety, and to the extent that it exceeds such requirements, that transportation has become a financial contribution by the school districts to non-public schools. They contend that the vast majority of

non-public schools are religious institutions and, as a result, aid to non-public schools becomes direct aid to religious institutions. They argue that such direct aid violates the First Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment of that Constitution, and Articles One and Three of the Pennsylvania Constitution, all of which prohibit the establishment of a religion and require the separation of church and state.

The answer to the challenge and arguments of the School Districts cannot be given by this administrative hearing examiner. The ultimate goal of these proceedings is the report to the Secretary of Education of the facts and arguments produced by and at the hearing and to recommend to the Secretary what his actions should be based upon those facts and arguments. This is not a court of law and does not make a judicial review or interpretation. Moreover, a fundamental concept underlying this procedure is that the act or statute being applied and which is sought to be enforced is constitutional and valid. The administrative branch of government has the sole duty to enforce and execute the laws of the Commonwealth. The review and interpretation of constitutionality and other legal validity of laws passed by the General Assembly is reserved expressly to the judicial branch of government. Although an administrative agency or any part of the executive branch of government may review and, if necessary, invalidate regulations promulgated and enacted by the executive, only the judiciary may review and pass upon the legal validity of a statute enacted by the legislative. This is basic to American constitutional law. *Marbury* vs *Madison,* 1 Cranch 137 (1803).

The reservation to the judiciary of review of the legal validity of statutes does more than preclude the executive from reviewing the legal and constitutional validity of such statutes. It requires the executive, in its actions, to enforce and execute such statutes and to assume and presume those statutes valid in their execution. This principle requires the Department of Education not only to refuse to invalidate Act 372 as unconstitutional, but to act at all times as if Act 372 is constitutional and valid in all ways. Obviously, a statute cannot be meaningfully executed unless the executive branch presumes it valid. If the executive branch were to decide a statute invalid and refuse to enforce it, the circumstances necessary for proper judicial review would never arise with sufficient clarity for the judiciary to properly review the statute. Consequently, the executive must presume a statute valid and execute it forcefully based upon that presumption. To do anything less would thwart judicial review. *Dauphin County Grand Jury Investigation Proceedings (No. 2),* 332 Pa. 342, 2 A. 2d. 1804 (1938). *Hetherington* vs *McHale,* 10 Pa. Cmwlth. 501, 311 A. 2d 162 (1973). The Pennsylvania Administrative Code, under which these hearings are held, recognizes such limitations on the power of administrative agencies to decide or even review the constitutionality of statutes. Section 187 of Chapter 35 of the Pennsylvania Administrative Code (1 Pa. Code 13.187) denies the power to any hearing examiner to rule upon or recommend to his agency head to rule upon the constitutional or legal validity of a statute being implemented. The denial of such a power is by design; should the Administrative Code provide such an authority, it would clearly conflict with the separation of powers doctrine discussed above.

The School Districts both raise serious constitutional challenge to the validity of Act 372. Certain aspects of the challenge have been discussed and disposed of by the United States Supreme Court in *Everson* vs *Board of Education of Ewing Township,* 330 U.S. 1; 67 Sup. Ct. 504; 91 L. Ed. 711 (1947) and the Pennsylvania Supreme Court in *Rhoades* vs *School District of Abington Township,* 424 Pa. 202; 226 A. 2d. 53; *cert. den.* 389 U.S. 486; 88 Sup. Ct. —, 19 L. Ed. 2d —, *app. dis'd.* 389 U.S. 11; 88 Sup. Ct. 61; 19 L. Ed. 2d. 7 (1967). However, some of the arguments raised by the School Districts here seem to at least parallel the arguments raised and decided in *Americans United for Separation of Church and State* vs *Benton, supra.* The legal issues are fascinating and appear to pose some doubt as to the continued constitutionality and validity of Act 372. However, that determination is one reserved, both by law and by good sense, to the judicial system. In accordance with the above discussion, and with the said good sense, this hearing examiner makes no judgment or recommendation as to the constitutionality of Act 372, presumes the Act to be valid, and recommends action to the Secretary of Education based upon that presumption.

III. THE HEARING EXAMINER'S REFUSAL TO COMPEL THE TESTIMONY OF THE SECRETARY OF EDUCATION AND THE ATTORNEY GENERAL WAS NOT A DENIAL OF DUE PROCESS BUT WAS IN ACCORDANCE WITH ACCEPTED ADMINISTRATIVE LAW

During the course of the hearing, McKeesport requested that the Secretary of Education and that Mark P. Widoff, Deputy Attorney General, be called as witnesses and made available for cross-examination by McKeesport. Upon direction of the hearing examiner,

and under date of 15 April 1975, McKeesport set forth its request in writing, specifying McKeesport's reasons for requesting the testimony and the general scope of the testimony it sought to elicit. A copy of that request is attached as Exhibit "A" to the brief of McKeesport.

The hearing examiner denied the request of McKeesport and McKeesport has now raised that denial of its request as a denial of the due process rights of the School District during the hearing procedures and as a challenge to the legality and propriety of the entire hearing procedure.

There are several administration and enforcement problems with subpoenaing the Secretary of Education to appear at his own hearing, any one of which would be sufficient to dispose of the challenge made here by McKeesport. Since the hearing examiner's authorities and powers are derived solely from the Secretary of Education, it is unlikely that a subpoena issued would be legally enforceable. All authorities of the hearing examiner come from the Secretary. Not only may the Secretary refuse to testify and ignore a subpoena but he may remove the hearing examiner so issuing such a subpoena.

The doctrine of the separation of powers would present major problems to any attempt to enforce a subpoena issued by a hearing examiner. There is some old authority in Pennsylvania which recognizes such a difficulty and would appear to prevent judicial enforcement of such a subpoena. *Hartranfts' Appeal,* 85 Pa. 433 (1877). *Grand Jury Investigation of Western State Penitentiary,* 173 Pa. *Supra* 197; 96 A. 2s. 189 (1958).

There are also other obvious and inherent difficulties with calling as a witness the ultimate decision-maker in

this process. The Department made many other persons available who could testify about the subject areas on which McKeesport sought to cross-examine the Secretary. Those other witnesses, whose direct knowledge of the procedures and events would be more useful than the Secretary's own, should have been sufficient to meet the requests of McKeesport. Any attempt to cross-examine the Secretary on his intention or his personal interpretations of Act 372 would simply not be proper at this stage of the hearing.

More importantly, the law of administrative procedure contains long-standing authority which dictates our course in this situation. In fact, it is difficult to imagine an area of administrative law more fully litigated, firmly established, and beyond effective challenge.

During the 1930's and 1940's and the early formative stages of administrative law in this country, the United States Supreme Court heard, studied, and decided a series of cases which mapped out and established the parameters of modern administrative law. The cases, known collectively as the *Morgan* decisions, grew out of a Department of Agriculture investigation and price-setting procedure in the Kansas City Stockyards. The hearing compiled over 10,000 pages of transcript and 1,000 exhibits and resulted in orders by the Secretary of Agriculture which were appealed by fifty companies dealing at those stockyards. The case went to the United States Supreme Court four times, involved extensive litigation and hearings before various administrative officials and at all stages of the federal court system during the New Deal period when administrative law was first being considered and establish by the federal court system.

In the first two decisions in the case by the United States Supreme Court, the very issue raised here by McKeesport was considered, decided, reconsidered, and redecided by that Court. In its struggle to accurately and adequately define the due process requirements of an administrative hearing, the Supreme Court determined the right of a party to examine into the mental processes and actions of an administrative official in reaching his administrative decision. Following some rather unclear language in the first *Morgan* decision, *Morgan* vs *United States,* 298 U.S. 468; 56 Sup. Co. 906; L. Ed. 1288 (1936) (hereinafter referred to as *Morgan I*) the District Court to which the case had been remanded allowed the plaintiffs so depose and examine the Secretary of Agriculture to determine precisely what part he personally played in the decision to order rate regulations and the extent to which he personally reviewed the enormous record built in the case. Following a rehearing, the matter again was appealed through the lower courts to the United States Supreme Court and, in the second *Morgan* decision (*Morgan* II), 204 U.S. 1; 58 Sup. Ct. 773; 19 L. Ed. 1129 (1937), the Supreme Court, after reviewing the administrative decision and remanding the matter again to the Secretary of Agriculture, stated clearly that the District Court was not to allow review of the mental processes of the Secretary himself. After quoting from the Secretary of Agriculture's answers to several questions during deposition and examination, the Court said:

> In light of this testimony there was no occasion to discuss the extent to which the Secretary examined the evidence and we agreed with the Government's contention that it was not the function of the Court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. (304 U.S. at 18)

In the final *Morgan* decision (*Morgan IV*) 313 U.S. 409, 61 Sup. Ct. 999; 85 L. Ed. 1429 (1941), the Supreme Court, after years of experience and progress in determining administrative hearing rights, was much more explicit. *Morgan IV* was the culmination of the Court's long struggle to develop and approve an administrative procedure which would protect and guarantee all constitutional due process rights. After carefully reviewing and approving of the procedures observed during the hearing and after disposing of each of Petitioners' objections to such hearing, the Court again discussed the propriety of personally examining the Secretary of Agriculture. The Court said at 313 U.S. 191:

> But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusion of his order, including the manner and extent of his study of the record, and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should

never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding" *Morgan* vs *United States,* 298 U.S. 468, 480. Such an examination of a Judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the Court to probe the mental processes of the Secretary" 304 U.S. 1, 18. Just as a judge cannot be subject to such scrutiny, compare *Fayerweather* vs *Ritch,* 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See *Chicago B. & Q. R. Y. Co.* vs *Bodcock,* 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* vs *Morgan,* 307 U.S. 183, 191.

It is difficult to imagine a more fully and carefully considered decision than *Morgan IV,* the end result of eleven years of administrative process and court litigation which was reviewed, considered, and decided four times by the United States Supreme Court and which was the conscious instrument of the development of administrative law in this Country.

Morgan IV involved the testimony of an administrative official regarding his decision following a hearing. McKeesport here would appear to seek the testimony of the Secretary regarding his decision in formulating the interpretation of Act 372 rather than in reviewing a decision, as in *Morgan,* whether or not some party was

in violation of that decision. However, the umbrella of the *Morgan IV* admonition covers both rule-making and adjudication functions of administrative law. In *National Nutritional Foods Association* vs *Food and Drug Administration,* 491 F. 2d. 1141 (2 C.A.; 1974) The Second Circuit Court of Appeals, speaking through Judge Friendly, denied a petitioner's request to examine the commissioner of the Federal Food and Drug Administration. The opinion was based firmly upon *Morgan IV* and contained an excellent discussion of the development of that law to date. Judge Friendly discussed several important cases which the petitioners contended undercut or altered the law of *Morgan IV*. Judge Friendly's well-written opinion establishes that nothing in the intervening decisions or in any other aspect of administrative law has changed the basic premise of *Morgan IV* as set forth above. The opinion also makes it clear that the doctrine of *Morgan IV* applies to the rule-making function of administrative action as much today as it did in 1941.

From *Morgan* and the *National Nutritional Foods Association* cases, it is clear that the request of McKeesport to compel the testimony and cross-examination of the Secretary of Education cannot be granted. There is probably no more clearly established doctrine in all of American law today.

Finally, McKeesport seeks to take the testimony, again under cross-examination, of Mark P. Widoff, the Deputy Attorney General who wrote the Attorney General's opinion requiring or justifying the interpretation of Act 372 which has been pursued by the Department of Education. McKeesport contends it has a right to cross-examine the author of that opinion in order to attack its validity. There are two answers to that request.

First, McKeesport cannot do by indirection that which it cannot do directly. That is, since the law of *Morgan IV* and the cases thereunder prohibit review of the mental processes of the Secretary in determining the interpretation of Act 372, McKeesport cannot inquire into the mental processes and the reasons for them by merely calling as a witness the administrative official who advised the Secretary in his interpretation. To allow McKeesport to cross-examine Mr. Widoff into his rationale and theory in writing his advisory opinion to the Secretary would merely allow indirectly the very thing which *Morgan IV* and its progeny prohibit.

Finally, the Attorney General's opinion authored by Mr. Widoff has not been considered or used at all by this hearing examiner in determining his recommendation to the Secretary of Education. This hearing procedure comprises a new start and an independent view of the interpretation of Act 372. Since this review and interpretation of Act 372 do not in any way rely upon or even consider the Attorney General's opinion authored by Mr. Widoff, there is no reason to consider Mr. Widoff's reasons and rationale for it.

For these reasons the request of McKeesport to take the testimony of Mark P. Widoff and of the Secretary of Education were originally denied. For the same reasons the challenge to the validity of this hearing procedure must be dismissed.

SAMUEL L. ANDES
Hearing Examiner

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE ADMINISTRATIVE HEARINGS UNDER ACT 372 MCKEESPORT AND KISKI AREA SCHOOL DISTRICTS	FILE NO. 1974-5 1974-6

Final Order

AND NOW, this 11th day of April, 1977, upon consideration of all the testimony presented in the above-captioned hearing, it is hereby Ordered and Decreed that:

1. The report of the hearing officer dated October 1, 1976 and attached to this final order is hereby explicitly incorporated by reference.

2. The exceptions of the McKeesport Area School District and the Kiski Area School District filed October 12, 1976 to the hearing examiner's report, are hereby explicitly dismissed.

3. The McKeesport Area School District and the Kiski Area School District must transport all eligible non-public school children beyond the school district boundaries in accordance with the ten mile mandated requirement in Act 372, December 29, 1972, P.L. ——, No. 372, §1, 24 P.S. §13-1361.

4. All transportation subsidies paid to both of the afore-mentioned school districts pursuant to Act 372, 24 P.S. §13-1361, for the 1973-74 school year, and all sub-

sequent years, shall be recovered and hereby withheld from the transportation subsidies now due each school district until:

a. Each school district transports all eligible non-public school children, and

b. Until each school district agrees to reimburse the parents of the non-public school children for all past legitimate transportation costs incurred during the years each school district was acting in violation of Act 372, namely, 1973-74, 1974-75, and 1975-76.

5. The Final Order may be appealed to Commonwealth Court according to the Rules of Appellate Procedure.

ROBERT N. HENDERSHOT
Acting Secretary of Education

APPENDIX F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MCKEESPORT AREA SCHOOL DISTRICT,

Petitioner

vs.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

and

STANLEY T. HADUCH and CONSTANCE A. HADUCH, his wife; JOSEPH WILKS and HELEN WILKS, his wife; and JAMES J. O'HANLON and HELEN L. O'HANLON, his wife,

Intervenors

No. 934 C.D. 1977 (1774 ALLOCATUR DOCKET)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the McKeesport Area School District, Petitioner-Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Commonwealth Court of Pennsylvania entered in this action on October 25, 1978 upon which the Supreme Court of Pennsylvania denied both a Petition for Allowance of Appeal on October 22, 1979 and an Application for Reconsideration of Denial of Allowance of Appeal on November 28, 1979.

This appeal is taken pursuant to 28 U.C.C. §1257 (2).

ROBERT P. COSTELLO, ESQUIRE
Solicitor, McKeesport Area
School District

(Attorney for Petitioner)

APPENDIX G

Proof of Service

I hereby certify that I am this day serving a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the persons and in the manner indicated below, pursuant to Rule 33 of the Supreme Court of the United States. All parties required to be served have been served via:

United States mail, first class postage prepaid, and addressed as follows:

Sally Mrvos, Prothonotary
Supreme Court of Pennsylvania
801 City County Building
Pittsburgh, Pennsylvania 15219

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Dated:
February 6, 1980

Supreme Court, U. S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979
No. 79-1295

McKEESPORT AREA SCHOOL DISTRICT,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee

On Appeal From the Commonwealth Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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STATUTE:

Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361 6

MOTION TO DISMISS OR AFFIRM

The Appellee in the above entitled case moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Commonwealth Court of Pennsylvania on the ground that the federal question sought to be reviewed was correctly decided by the court below.

STATUTE INVOLVED

Pennsylvania's Act 372 of 1972 (Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361) is set out verbatim in Appellant's Jurisdictional Statement at page 4.

QUESTION INVOLVED

Does Act 372 violate the Establishment Clause of the First Amendment to the United States Constitution as a law respecting the establishment of religion?

STATEMENT OF THE CASE

The parties in this case are the McKeesport Area School District, Appellant, and the Pennsylvania Department of Education, Appellee. Appellee has a statutory duty to uphold the laws of the Commonwealth relating to public and nonpublic schools.

The Appellant School District, prior to the effective date of Act 372, failed to provide transportation for pupils attending nonpublic schools located outside the district's boundaries. On February 14, 1974, the Department issued a show cause letter to the Appellant School District placing in issue the possible withholding of transportation reimbursement for the 1973-74 school year. On December 23, 1974, the Department issued an amended order to show cause relying on the District's refusal to transport students beyond district boundaries.

An adjudicatory hearing was held during March and April, 1975 before a Hearing Examiner appointed by the Secretary. Briefs were filed by all parties and the Hearing Examiner's report was filed on October 4, 1976. Exceptions were filed by the Appellant. On April 11, 1977, the Acting Secretary of Education filed his final order requiring the Appellant School District to transport all eligible nonpublic school children beyond the school district boundaries in accordance with the ten mile mandated requirement in Act 372.

An appeal was taken by the Appellant to the Commonwealth Court of Pennsylvania, and, on October 25, 1978, the Commonwealth Court affirmed the portion of

the Acting Secretary's final order requiring the transportation of eligible school children beyond district boundaries. The Appellant School District took a further appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania, on October 22, 1979, denied Appellant's petition for allowance of appeal. The Appellant then filed an application for reconsideration of denial of allowance of appeal with the Supreme Court of Pennsylvania. That application was denied on November 28, 1979.

MOTION TO DISMISS

The Case Presents No Substantial Federal Question

This appeal raises the question of the constitutionality of Pennsylvania's "Pupil Transportation" Act (Act of December 29, 1972, No. 372, P.L. 1726, 24 P.S. §13-1361, as amended). This identical issue was previously raised before the Court, and dismissed for want of a substantial federal question. *School District of Pittsburgh v. Pennsylvania Department of Education, et al.,* U.S. , 99 S.Ct. 3091, 61 L.Ed. 2d 869 (1979).

This statute (hereinafter referred to as "Act 372") provides the same transportation benefits to both public and nonpublic school pupils, namely, transportation to and from the schools in which they are enrolled. For purposes of reimbursement by the state, Act 372 establishes a maximum ten mile limitation on the transportation provided by public school districts to pupils enrolled in nonpublic schools. Insofar as the statute provides transportation "to and from school" for all resident pupils, the transportation benefits are the same for public and nonpublic school students alike.

Since the decision in *Everson v. Board of Education of Ewing Township, N. J.,* 330 U.S. 1 (1946), it has been well established that the Supreme Court will only strike down a state statute if it is clearly beyond the state's constitutional power.

Appellant's assertion that the affirmation of the decision below in *Luetkemeyer v. Kaufman,* 419 U.S. 888 (1974), is a decision "not to extend nonpublic school transportation beyond the *Everson* parameters" (Jurisdictional Statement at 9), ignores the fact that the Missouri statute, unlike the Pennsylvania statute, simply did not provide public school transportation.

Similarly, *Americans United for Separation of Church and State v. Benton,* 413 F. Supp. 955 (S.D. Iowa, 1975), is clearly distinguishable on its facts. That case involved a statute which sought to provide transportation to students in contravention of a statutory prohibition against transportation of public school pupils across district boundaries. There is no such statutory prohibition in Pennsylvania. In fact, public school pupils in Pennsylvania may attend schools in other states (Public School Code of 1949, as amended, P.L. 30, 24 P.S. §13-1315) and in other districts (*Id.* at 24 P.S. §13-1313).

The third case cited by Appellant is similarly distinguishable. *Members of the Jamestown Committee v. Schmidt,* 427 F. Supp. 1338 (D.R.I., 1977). Under the Rhode Island school laws, as under the Iowa school laws, public school children could be transported "only within the local school district." As stated above, this is not the situation under the Pennsylvania school laws. Also, in *Schmidt* the District Court pointed with favor to "the requirement announced in *Everson* . . . that benefits be provided in common, substantially equally, without distinctions between children attending sectarian and public schools." *Id.* at 1348. Thus, neither *Benton,* nor *Schmidt,* creates any conflict with this Court's decision in *Everson.*

Finally, Appellant's request that this Court's prior decision in *Everson* be reconsidered would upset the long established Constitutional precedent of "benevolent neutrality," *Walz v. Tax Commission,* 397 U.S. 664 (1979), and overturn the practice of many states to legislate health and safety measures for children and to provide constitutionally permitted state programs such as "[b]us transportation . . supplied in common to all students." *Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971).

MOTION TO AFFIRM

A previous Pennsylvania statute permitting the transportation of nonpublic school pupils was challenged in this Court in 1967 on Establishment Clause grounds and this Court dismissed the appeal, *Rhoades v. School District of Abington Township,* 389 U.S. 11 (1967), and denied a petition for *certiorari* in the companion case, *Womell v. Matters,* 389 U.S. 46 (1967).

As recently as 1970, this Court discussed and cited with favor its earlier *Everson* case in *Walz.* Even more recently, in 1977, this Court decided another pupil transportation case, had the opportunity to reverse its holding in *Everson* and did not do so. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). Nevertheless, Appellant is now asking this Court to reverse itself and the law pronounced in the *Everson* case.

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment and order entered in the cause by the Commonwealth Court of Pennsylvania.

Respectfully submitted,

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